IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Ram Swarup & anr. vs. Moti Lal & ors.

S.B. Civil Second Appeal No.64/1988 against the judgment and decree dated 29.2.1988 passed by the Addl. District Judge, Bikaner in Civil Appeal(decree) No.78/86.

Date of Judgment: May 12, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr.R.R. Nagori, for the appellants.

BY THE COURT:

The appellants are aggrieved against the judgment and decree of the first appellate court dated 29.2.1988 by which the first appellate court held that the plaintiff since filed the present suit during the pendency of his earlier filed suit for recovery of the rent of overlapping period without leave of the court, therefore, the plaintiff cannot get the decree of Rs.250/- which was the amount of rent due in the defendant and was subject matter in the earlier filed suit. The first appellate court also held that since the plaintiff cannot agitate the issue which was raised by him in earlier suit, therefore, the trial court has committed illegality in declaring the defendant-tenant first defaulter.

The brief facts of the case are that the plaintiff filed suit for eviction of the tenant-defendant Moti Lal having number 14/75. In that suit the plaintiff claimed rent of Rs.250/- which was the rent of 25 months of the rented premises and for the period starting from *Migsar Vadi-1(ekam) Samvat Year, 2029 to Migsar Sudi-15 (Punam) Samvat Year 2031.* During the pendency of said suit no.14/75, the plaintiff filed the present suit no.152/76 and included the above said period of default and sought decree for eviction of the tenant on the ground of default of more period. The plaintiff's suit was also on the ground of personal bonafide necessity. The plaintiff did not produce any evidence in subsequently filed suit no.152/76 despite the fact that the trial court framed issue no.1 that whether the defendant has committed default in payment of rent.

The defendant in present suit, took a defence that the present suit with respect to rent of Rs.250/- for the period referred above is not maintainable. In the present suit, with the consent of the parties, the rent was determined by the trial court under Section 13(3) of the Act of 1950. The rent was deposited by the tenant in the court for which there is no dispute. The trial court held that since the earlier suit was dismissed as withdrawn and has not been decided on merits, therefore, the relief in relation to the rent of Rs.250/- for the period referred above, cannot be granted in the present suit. The trial court, therefore,

decreed the suit of the plaintiff for Rs.250/- after giving benefit of first default to the tenant-defendant and dismissed the suit of eviction of the tenant. The tenant still not satisfied and aggrieved against the decree of Rs.250/-, preferred regular first appeal. Said appeal was allowed by the first appellate court after holding that the tenant has paid the determined rent and also subsequent rent during the pendency of the suit. The first appellate court also held that in fact even if the rent was determined on the basis of tenancy with Hindi months and even if the tenant deposited the rent according to English Calendar months, still since the defendant has deposited the rent in advance and that too, of eight months, he cannot be declared even first defaulter. The appellate court, therefore, set aside the decree for arrears of rent amounting to Rs.250/- and also set aside the finding of the trial court declaring the defendant first defaulter. Hence this second appeal.

According to the learned counsel for the appellant, since the plaintiff withdrew his suit no.14/75 after filing of the present suit, therefore, the present suit was not barred and the first appellate court was wrong in setting aside the finding of the trial court about the default committed by the defendant. It is also submitted that defendant deposited the rent according to English Calendar months instead of Hindi months, therefore, also the defendant is defaulter.

I considered the submissions of the learned counsel for the appellant and perused the facts of the case.

It is clear from the facts referred above itself that the plaintiff without withdrawing the earlier suit, filed the subsequent suit and in subsequent suit, the rent was determined and the tenant deposited the rent in court. The amount of rent claimed in the earlier suit was of 25 months and that suit was withdrawn by the plaintiff after filing the present suit. Therefore, if the first appellate court, in a case where plaintiff himself did not appear in the witness-box to prove his case about the default of the tenant, set aside the finding of the trial court about the first default of the tenant, the first appellate court has not committed any error of fact or law. The peculiar facts of the case is that none of the party or the court below looked into this aspect of the matter whether a suit for arrears of rent or declaring the defendant defaulter could have been decreed in a case where the defendant has set up a case that he has paid the rent and admittedly, that payment of rent is for the period before filing the present suit by the plaintiff. Therefore, in fact, it is case of no evidence so far as first default is concerned and the plaintiff cannot seek decree of eviction or of Rs.250/- in absence of proof of non-payment of Rs.250/- by the tenant.

In view of the above, I do not find any merit in this appeal. It will be relevant to mention here that the appeal was admitted by this Court

on 26.8.1988 but without framing any substantial question of law. No substantial question of law is involved ins this appeal.

Therefore, the appeal of the appellant is dismissed.

(**PRAKASH TATIA),J.**

mlt.